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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

United States of America,)	CR 09-01423-TUC-JMR(HCE)
Plaintiff,)	REPORT AND RECOMMENDATION
vs.)	
Dionicio Reyes-Perez,)	
Defendant.)	
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Defendant filed a Motion to Suppress Statements (Doc. No 32). The Government filed a Response to Defendant’s Motion to Suppress (Doc. No. 45). Defendant filed a Reply to the Government’s Response to Motion to Suppress Statements (Doc. No.55).

Defendant’s motion came on for hearing on May 26, 2010. Border Patrol Agent Helaman Lambson (hereinafter “BPA Lambson”) testified (hereinafter “Lambson at p. _”) on behalf of the Government. Defendant testified (hereinafter “Reyes-Perez at p. _”) on his own behalf. A transcript of the May 26, 2010 hearing was ordered by the Magistrate Judge, filed on June 3, 2010 (Doc. No. 68), and is forwarded to the District Court for review.

Six exhibits were admitted into evidence: (1) Government Exhibit 1: a map of Nogales, Arizona; (2) Government Exhibit 2: Photo of warehouse “W9” in the King Louis area of Nogales, Arizona; (3) Government Exhibit 3: Photo of outside of warehouse “W9”; (4) Government Exhibit 4: Photo of alley next to warehouse “W9”; (5) Government Exhibit

1 5: Photo of wall in alley next to warehouse "W9"; (6) Government Exhibit 6: Photo of roof
2 of warehouse "W9". These exhibits are forwarded to the District Court for review.

3 **I. INDICTMENT**

4 Defendant is charged with being an alien who entered and was found at or near
5 Nogales, Arizona, in the District of Arizona on June 20, 2009, after having been denied
6 admission, excluded, deported, and removed from the United States of America at Laredo,
7 Texas on July 9, 2008 and he did not obtain the express consent of the Attorney General or
8 the Secretary of the Department of Homeland Security to reapply for admission to the United
9 states of America, in violation of 8 U.S.C. §1326, enhanced by 8 U.S.C. §1326(b)(2).

10 **II. FACTUAL BACKGROUND**

11 BPA Lambson has worked as a Border Patrol agent in Nogales, Arizona for
12 approximately 3½ years. (Lambson at p. 14). He reads, writes and speaks fluently in Spanish
13 and is certified to teach Spanish to new Border Patrol agents. (*Id.* at pp.14-15). BPA
14 Lambson was assigned to work an area of Nogales, Arizona, referred to as King Louis. (*Id.*
15 at p. 18). The King Louis area is located at Mariposa Avenue and Freeport Drive in Nogales,
16 Arizona. (*Id.* at p. 16). The King Louis area consists of a series of warehouses located
17 approximately 100 to 150 yards north of the United States-Mexico border.¹ (*Id.* at pp. 16-17).
18 BPA Lambson has been told and shown by other more experienced Border Patrol agents of
19 common hiding places used by suspected undocumented aliens, including a warehouse
20 labeled "W9". (*Id.* at p. 18). Moreover, BPA Lambson has been told by the owners of
21 warehouse W9 of the damage caused to the roof because of the weight of undocumented
22 aliens utilizing the roof. (*Id.* at p. 49). On June 20, 2009, a Saturday, at approximately 7:00
23 a.m., BPA Lambson went to warehouse W9 to check on its roof for undocumented aliens.
24 (*Id.* at p. 48).

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28 ¹On Government Exhibit 1, the King Louis area is denoted with the letter "A".

1 BPA Lambson parked his patrol vehicle on the westside of W9² near an alleyway³ that
2 runs alongside this warehouse. He walked down the alleyway to a wall⁴ that he climbed in
3 order to peek onto the roof of warehouse W9. The distance from the top of the wall to the
4 edge of the roof is 7 feet. (*Id.* at p. 47). BPA Lambson is 6 feet tall and had to pull himself
5 up to the edge of the roof such that he hung from the edge of the roof. (*Id.* at pp. 21, 47).
6 Peering onto the roof, BPA Lambson espied seven individuals laying down. (Lambson at pp.
7 21-22; *see also* Reyes-Perez at p. 51). The individuals were not sleeping. (Lambson at p. 22;
8 Reyes-Perez at p. 52). The individuals were not visible from the street. (*Id.* at p. 48). The
9 reason the individuals were laying down was so that they could not be seen by anyone.
10 (Reyes-Perez at p. 52). Among the individuals was Defendant. (Lambson at p. 23).

11 BPA Lambson testified that he told the individuals to stop, remain laying down, and
12 that he was a Border Patrol agent. (Lambson at pp. 22, 36). He thought the individuals might
13 be in the United States illegally. (*Id.* at p. 23). He testified that he did not tell the individuals
14 that they were in custody and were not free to leave⁵; nor did he handcuff them or un-holster
15 his firearm. (*Id.* at p. 23). BPA Lambson did not tell the individuals that they were under
16 arrest. (Reyes-Perez at p. 55). He did, however, ask them questions collectively in Spanish
17 and made sure that each one responded to his questions. (Lambson at p. 24). He asked the
18 individuals of what country they were citizens and they, including Defendant, responded
19 “Mexico”. (*Id.* at pp. 24-25). He asked the individuals if they had documentation to show that
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21 ²See Government Exhibit 3. (Lambson at pp. 19-20).

22 ³See Government Exhibit 4. (Lambson at p. 21).

23 ⁴See Government Exhibit 5. (Lambson at p. 21).

24 ⁵Defendant, who was assisted by a court interpreter at the suppression hearing,
25 understands English and speaks some, but not proficiently enough to testify in English.
26 (Reyes-Perez at p. 51). Defendant testified that BPA Lambson told the individuals not to run
27 because they were surrounded. (*Id.* at p. 52). Defendant felt that he could have tried to escape
28 and leave but did not because BPA Lambson had ordered the individuals to stay and had said
that they were surrounded. (*Id.* at p. 53).

1 they were in the United States legally and they, including Defendant, responded that they did
2 not. (*Id.* at p. 25).

3 BPA Lambson radioed for other agents to come and assist him in taking the
4 individuals down from the roof. (*Id.*). Once on the ground ten to fifteen minutes later,
5 Defendant was individually asked questions by BPA Lambson. (*Id.* at pp. 26-27).
6 Specifically, he was asked and he answered in pertinent part, his name: Dionicio Reyes-
7 Perez; where was he born: Tuxpan, Nayarit, Mexico; when had he entered the United States:
8 earlier that morning; whether he had permission to be in the United States: no he did not have
9 permission; and if he knew it was illegal to enter in the manner that he had used: he knew it
10 was illegal. (*Id.* at pp. 27-29). Defendant was not threatened, coerced, or promised anything
11 in exchange for answering BPA Lambson's questions. (*Id.* at p. 29). BPA Lambson
12 considered Defendant to be in custody at this time. (*Id.* at p. 42). He did not, however, advise
13 Defendant of his *Miranda* rights prior to asking him the aforesaid questions. (*Id.* at p. 43).

14 Because of the large number of illegal entrants in the area, Border Patrol agents,
15 including BPA Lambson, do not advise arrestees of their *Miranda* rights until they are later
16 at the Border Patrol station. (*Id.*). Defendant was not advised of his *Miranda* rights until
17 approximately 6:00 p.m. at which time he stated he was a citizen of Mexico, born on
18 December 2, 1962 in Nayarit, Mexico; that he entered the United States illegally the morning
19 of June 20, 2009 near Nogales, Arizona; that he had been previously removed from the
20 United States and had not applied for permission to re-enter. (Government's Response to
21 Defense Motion to Suppress at pp. 2-3).

22 **III. DISCUSSION**

23 **A. Statements Not To Be Used By The Government At Trial**

24 The Government has avowed not to introduce in its case-in-chief, *non-Mirandized*
25 *a* statements made by Defendant to BPA Lambson once off the roof and on the ground. (May
26 26, 2010 Hearing at pp. 62). It will introduce such statements for impeachment and rebuttal
27 should Defendant testify and deny making such statements. (*Id.* at p. 63).

28 The Government has avowed not to introduce in its case-in-chief, nor for

1 impeachment or rebuttal, *post-Miranda* statements made by Defendant 11 hours after he was
2 first encountered by BPA Lambson. (*Id.*); *See* 18 U.S.C. §3501(c).

3 **B. Statements Sought To Be Used By The Government**

4 The only statements at issue are Defendant's answers to questions collectively asked
5 by BPA Lambson of Defendant and the other individuals on the roof of warehouse W9.

6 **1. Law**

7 It is well-established that investigatory stops by law enforcement, however brief, are
8 governed by the Fourth Amendment. *Terry v. Ohio*, 392 U.S. 1, 20-21 (1968). Investigatory
9 stops are lawful provided that they are based on reasonable, articulable suspicion that a
10 person is engaged in criminal activity. *United States v. Arvizu*, 534 U.S. 266, 273
11 (2002)("[T]he Fourth Amendment is satisfied if the officer's action is supported by
12 reasonable suspicion to believe that criminal activity 'may be afoot.'"); *United States v.*
13 *Orman*, 486 F.3d 1170, 1171-72, 1176-77 (9th Cir. 2007)(investigatory stop valid because
14 officer had reasonable suspicion defendant was carrying a gun).

15 In determining whether reasonable, articulable suspicion exists at the time of the
16 investigatory stop, a "totality of the circumstances" test is applied. *Arvizu*, 534 U.S. at 275-
17 77; *United States v. Cortez*, 449 U.S. 411, 417 (1981). Reasonable suspicion must objectively
18 exist. *Arvizu*, 534 U.S. at 273. Furthermore, reasonable suspicion is based upon the law
19 enforcement officer's personal observations and knowledge that a crime has been committed.
20 *United States v. Hartz*, 458 F.3d 1011, 1017-18 (9th Cir. 2006) (reasonable suspicion to stop
21 based upon police observation of vehicle with seemingly new license plates attached by "zip-
22 ties" and such vehicle matched description of recently stolen vehicle); *United States v.*
23 *Summers*, 268 F.3d 683, 687 (9th Cir. 2001)(reasonable suspicion to detain individual who
24 gave questionable explanation during consensual questioning near charity collection station
25 late at night). Courts give considerable deference to a law enforcement officer, basing such
26 reasoning on that officer's experience in discerning criminal conduct not readily evident to
27 a lay person. *Arvizu*, 534 U.S. at 277.

28 The range of law-enforcement permitted activity during an investigatory stop must be

1 reasonably related in scope to the circumstances giving rise to the stop in the first instance.
2 *United States v. Sharpe*, 470 U.S. 675, 682 (1985). If reasonable suspicion exists, law
3 enforcement may detain a person to ascertain his or her identity. *United States v. Christian*,
4 356 F.3d 1103, 1106 (9th Cir. 2004)(reasonable to request suspect's identification when law
5 enforcement had reasonable suspicion that subject of complaint involving weapon was still
6 in apartment complex and officers had been given name from complainant). When law
7 enforcement detains a suspect beyond the amount of time that is necessary to effectuate the
8 purpose of the stop, the seizure transforms into an arrest and must be supported by probable
9 cause. *United States v. Brignoni-Ponce*, 422 U.S. 873, 880-81 (1975). The Supreme Court
10 has declined to establish a "bright line" rule in determining when an investigatory stop
11 becomes an arrest. *United States v. Sharpe*, 470 U.S. at 685 ("Much as a 'bright line' rule
12 would be desirable, in evaluating whether an investigative detention is unreasonable,
13 common sense and ordinary human experience must govern over rigid criteria.").

14 2. Analysis

15 BPA Lambson had been informed and shown by more experienced Border Patrol
16 agents, common hiding places used by undocumented aliens, including the roof of warehouse
17 W9. He had also been informed by the owners of warehouse W9 that the weight of
18 individuals on their roof was causing damage to the roof. Warehouse W9 is 100 to 150 yards
19 from the United States-Mexico border. On Saturday, June 20, 2009 at 7:00 a.m., BPA
20 Lambson could not see from the ground whether anyone was on the roof of warehouse W9.
21 He climbed on a wall next to warehouse W9, pulled himself up to the edge of the roof, and
22 peered over to see whether anyone was there. He observed seven individuals on the roof
23 laying down, but they were not sleeping. He told them in Spanish to remain laying down and
24 that he was a Border Patrol agent. BPA Lambson suspected the individuals might be
25 undocumented aliens.

26 BPA Lambson climbed onto the roof. He did not un-holster his firearm, did not
27 handcuff anyone, did not tell them that they were under arrest or in custody, and did not tell
28 them they were not free to leave. Instead, he asked them collectively of which country they

1 were from and if they had documentation showing they had permission to be in the United
2 States. They, including Defendant, collectively answered that they were from Mexico and
3 did not have documentation. Ten to fifteen minutes later, with assistance from other Border
4 Patrol agents taking the individuals down from the roof, Defendant and the other individuals
5 were in custody and under arrest.

6 The totality of the circumstances establishes an objective and particularized suspicion
7 that Defendant and the other individuals were engaged in wrongdoing. In BPA Lambson's
8 experience, seven individuals, not otherwise observable from the street, laying down on the
9 roof of a warehouse known to be used by undocumented aliens and located 100 to 150 yards
10 from the United States-Mexico border, at 7:00 a.m. gives rise to a reasonable suspicion that
11 crime is afoot. *See United States v. Berber-Tinoco*, 510 F.3d 1083, 1088 (9th Cir. 2007), *cert.*
12 *denied* __U.S.__, 129 S.Ct. 105 (2008), (reasonable suspicion in part because law
13 enforcement knew someone had illegally crossed border when seismic activation device was
14 activated). Law enforcement observations and conclusions are accorded great deference.
15 *United States v. Mayo*, 394 F.3d 1271, 1275 (9th Cir. 2005). The investigatory stop herein
16 was reasonably related to the circumstances that initially justified it: a Border Patrol agent
17 coming upon seven individuals laying down on the roof of a warehouse located a short
18 distance from the United States-Mexico border and brief inquiry to ascertain from the seven
19 individuals on the roof where they were from and, given their answer of "Mexico", if they
20 were documented to be in the United States. *United States v. Turvin*, 517 F.3d 1097, 1101-02
21 (9th Cir. 2008)(reasonable to pause ticket-writing process to ask questions unrelated to traffic
22 stop because questioning did not cause unreasonable delay and police had information
23 linking driver to rolling drug lab); *United States v. Galindo-Gallegos*, 244 F.3d 728, 732 (9th
24 Cir. 2001), *amended* 255 F.3d 1154 (9th Cir. 2001)("Where officers apprehend a substantial
25 number of suspects and question them in the open prior to arrest, this is ordinarily a *Terry*
26 stop, not custodial questioning,").

1 **IV. CONCLUSION**

2 Defendant and the other six individuals were not in custody and under arrest when
3 confronted by BPA Lambson on the roof of warehouse W9. Any questions asked of and
4 answers given by Defendant and the others were not the result of custodial interrogation. The
5 investigatory stop was brief and the scope of questioning was reasonably necessary to
6 effectuate the purpose of the stop. Consequently, BPA Lambson was not required to advise
7 Defendant, or the other individuals, of their *Miranda* rights.

8 **V. RECOMMENDATION**

9 The Magistrate Judge recommends that the District Court:

10 (1) DENY IN PART Defendant's Motion to Suppress Statements (Doc. No.
11 32) to the extent that answers given by Defendant to questions initially asked
12 on the roof top were pursuant to an investigatory *Terry* stop;

13 (2) In light of the Government's avowals at the suppression hearing, GRANT
14 IN PART Defendant's Motion to Suppress Statements (Doc. No. 32) to the
15 extent that:

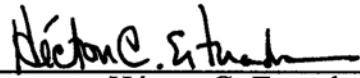
16 (a) *pre-Miranda* statements made on the ground ten to fifteen
17 minutes after the investigatory *Terry* stop will only be
18 introduced for impeachment of Defendant should he testify at
19 trial;

20 (b) *post-Miranda* statements made eleven hours after Defendant
21 was initially detained will not be introduced in the
22 Government's case-in-chief nor for impeachment of Defendant
23 should he testify at trial.

24 Pursuant to 28 U.S.C. §636(b) and Rule 59 of the Federal Rules of Criminal
25 Procedure, any party may serve and file written objections within fourteen (14) days after
26 being served with a copy of the Report and Recommendation. If objections are filed, the
27 parties should use the following case number: **CR 09-01423-TUC-JMR**.

1 Failure to file objections in accordance with Fed.R.Cr.P. 59 will result in waiver of
2 the right to review.

3 DATED this 17th day of June, 2010.

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Héctor C. Estrada
United States Magistrate Judge
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